IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 55 of 2004
with
CIVIL APPLICATION No. 4964 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDULBHAI HUSHENBHAI & 2 - Appellant(s)
Versus
JUSAB FATABHAI - Defendant(s)

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Appearance :
MR PJ KANABAR for Appellant(s) : 1 - 3.
MR SANDEEP N BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 23/08/2006

ORAL JUDGMENT

1. The appeal is admitted for hearing the parties on the following substantial question of law:-

"Whether on the facts and in the circumstances, the findings regarding possession of the plaintiff as recorded by the learned appellate court are perverse and contrary to the records?"

With the consent of the parties, the matter is finally heard.

2. Mr. Kanabar, learned counsel for the appellants-defendants submits that the trial court has dismissed the suit observing that the plaintiff was not in possession, but the appellate court illegally held that prior to grant of the injunction order by the Secretary in SRD/JMN/704/86, the plaintiff was already put in possession. He submits that the plaintiff had come with a case that he was put in possession of the property on 30th June, 1987. He submits that the first appellate court very conveniently brushed aside the positive evidence which could decide the case in favour of the appellants-defendants. It is also submitted that the reasons given by the learned trial court for dismissing the suit were not met by the appellate court while it was reversing the findings.
3. Mr. S.N. Bhatt, learned counsel for the respondent-plaintiff submits that at the time of issuance of Patta in favour of the plaintiff, he was put in possession and since thereafter, the plaintiff continued to be in possession. It is

submitted that the defendant was raising unnecessary pleas though he was not in possession of the property.

4. Mr.Kanabar, learned counsel for the appellants submits that if the plaintiff was put in possession in the year 1976, then, there was no good reason for the Mamlatdar to register an encroachment case as case no. 306/77-78. He submits that the registration of encroachment case in itself would be a proof of the fact that the defendant was in possession. After a hot contest between the parties and parties realizing that the cases were not conducted properly on their part at the level of the learned Civil Judge and probably, the parties were misled because of the registration and the dismissal of the revenue proceedings and that the learned courts below were also unnecessarily influenced by the revenue records less realizing that on the facts available on the records, the courts were not to decide the case with the help and assistance of the revenue records only and without arriving to a positive finding about possession, the parties submit that the judgments and decrees made by the two courts below be set aside and the matter be remitted back to the trial court with liberty in favour of the parties to amend their pleadings, produce further documents and lead further evidence, that is, for further trial with a direction that the evidence already available on

the records may also be taken into consideration.

5. Taking into consideration the nature of the dispute between the parties and that the first appellate court, in fact, misread the documents in observing that before the order dated 26.8.86 was issued by the Secretary, the plaintiff was put in possession and also that the question of possession and dispossession may be relevant, I am of the opinion that the judgment and decree passed by the learned first appellate court deserve to be set aside. Those are accordingly set aside. The judgment and decree passed by the learned trial court, with the consent of the parties, are set aside. The matter is remanded back to the trial court with liberty as sought by the parties in the above discussion of this order. The parties shall appear before the trial court on 9th October, 2006. Direct service of this order is permitted. Even otherwise, the Registry of this Court, while sending the records back [if received] to the trial court, shall send copy of this order enabling the learned trial court to understand as to what it is required to do. In case, the records have not been received from the trial court or appellate court, then too, the Registry of this Court shall send a copy of this order to the learned trial court making sure that the order reaches the court below before the date so fixed for appearance of the parties.

The appeal is allowed. The learned trial court is hereby directed to dispose of the suit within a period of nine months from the date of appearance of the parties. The trial court shall see that it does not cross the limit of nine months.

6. Consequently, Civil Application is allowed. Order of status-quo made by this Court shall continue to be operative till final disposal of the suit. Rule is made absolute in the Civil Application. No costs.

[R.S. GARG, J.]

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